

In The Matter Of:
United States vs.
PFC Bradley E. Manning

Vol. 13
July 1, 2013
UNOFFICIAL DRAFT - 7/1/13 Morning Session

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Min-U-Script® with Word Index

1 VOLUME XIII

2 IN THE UNITED STATES ARMY

3

4 UNITED STATES

5 VS.

6 MANNING, Bradley E., PFC COURT-MARTIAL

7 U.S. Army, xxxx-xx-9504

8 Headquarters and Headquarters Company,

9 U.S. Army Garrison,

10 Joint Base Myer-Henderson Hall,

11 Fort Myer, VA 22211

12 _____ /

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15 The Hearing in the above-titled matter was
16 continued on Monday, July 1, 2013, at 9:30 a.m., at
17 Fort Meade, Maryland, before the Honorable Colonel
18 Denise Lind, Judge.

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UNOFFICIAL DRAFT - 7/1/13 Morning Session

3

1 APPEARANCES:

2

3 ON BEHALF OF GOVERNMENT:

4

MAJOR ASHDEN FEIN

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CAPTAIN JOSEPH MORROW

6

CAPTAIN ALEXANDER van ELTEN

7

8

ON BEHALF OF ACCUSED:

9

DAVID COOMBS

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CAPTAIN JOSHUA TOOMAN

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MAJOR THOMAS HURLEY

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1 PROCEEDINGS,

2 THE COURT: Court is called to order. Major
3 Fein, please account for the parties.

4 MR. FEIN: Yes, ma'am. All parties in the
5 court last recessed are present with the following
6 exceptions: Mr. Robert Shaw, court reporter, is absent.
7 Mr. Chavez, court reporter is present. Captain von Elten
8 is also present.

9 THE COURT: All right. Are there any new
10 exhibits that we have to add to the court record?

11 MR. FEIN: Yes, ma'am.

12 | May I have a moment, Your Honor?

13 THE COURT: Yes.

14 MR. FEIN: Ma'am, what has been marked as
15 appellate exhibit 585 is a letter from the United States
16 to Mr. Christopher Butler with a subpoena attached
17 ordering his presence this morning at 0700 to be a
18 witness at this trial. What's been marked as appellate
19 exhibit 586 is a response from his attorney saying that
20 he can comply, but can only comply the week of July 8
21 based off the sudden notice of receiving the letter on

1 Friday, June 28.

2 THE COURT: What is appellate exhibit 584?

3 MR. FEIN: Your Honor, appellate exhibit 584
4 is the court's ruling on government's motion to admit
5 government exhibits 32, 31 and 109.

6 THE COURT: Thank you.

7 MR. FEIN: The rest are prosecution exhibits,
8 Your Honor, that are going to be stipulations of fact and
9 testimony that the court will be going over in a moment.

10 THE COURT: All right. Before we address
11 that, let's get back to these two appellate exhibits.
12 Counsel and I held a RCM 802 conference just prior to
13 coming on the record today where the government raised
14 the fact that this subpoena had gone to Internet Archive
15 and the email response. Defense, you had laid out your
16 position basically on how the defense was going to go
17 forward with respect to this issue. Would you like to
18 set that forth for the record?

19 MR. COOMBS: Yes, Your Honor.

20 On Sunday we received notice of the subpoena
21 for Mr. Butler. I spoke with Mr. Butler on the phone.

1 He indicated to the defense that Internet Archive was
2 actually contracted to capture the WikiLeaks website by
3 Stanford University. Stanford University apparently had
4 contracted with them to capture various websites that
5 they believe were of historical significance, and
6 WikiLeaks was one that was under a freedom of information
7 type websites.

8 Based upon that, I asked Mr. Butler to
9 explain the process to me. He indicated that once they
10 were contracted to do that, they would actually, the
11 organization themselves would pull the website on that
12 particular date to preserve it, pursuant to the contract.

13 I asked him to explain the actual
14 engineering, the technical aspect of how they did that.
15 He was not an expert in that, but said he could get
16 somebody from the organization that could explain that.

17 My defense expert, Mr. Trent Stuckman, then I
18 contacted to have present here today. We intend to call
19 Internet Archive over the lunch break. At that point my
20 expert will talk with their expert, they'll do their
21 technical conversation, and based upon that I believe

1 they will indicate that it was, in fact, captured by
2 Internet Archive on that date to the point that there
3 would be no reasonable authentication objection. If that
4 is the case, the defense would withdraw its
5 authentication objection.

6 THE COURT: All right. So we won't know the
7 actual results of that technical conversation until after
8 lunch today.

9 MR. COOMBS: Yes, Your Honor.

10 THE COURT: So we'll revisit that issue this
11 afternoon and the concern with that will be the timing of
12 the case, depending on if this witness isn't available
13 until the week of the 8th, then we will have to postpone
14 that piece of the government's case to those dates and
15 decide how to proceed in light of having to do that.
16 Should the authentication objection be withdrawn, then
17 that will no longer be an issue before the court.

18 Is there anything else we need to address
19 with respect to the subpoena and the response?

20 MR. FEIN: No, Your Honor.

21 MR. COOMBS: No, Your Honor.

1 THE COURT: Before we get into the
2 stipulations of fact and expected testimony, would you,
3 Major Fein, please give an accounting of the media
4 operations center as well as the public?

5 MR. FEIN: Yes, ma'am. This morning at the
6 start of the trial, Your Honor, there's 15 members of the
7 media at the operations center, one stenographer, there's
8 no media in the courtroom, 25 spectators in the
9 courtroom, and there are five spectators in the trailer.
10 The rest of the trailer is still available if more show
11 up.

12 THE COURT: I assume the theater --

13 MR. FEIN: -- is not currently being used,
14 ma'am.

15 THE COURT: Is there anything else we need on
16 address.

17 MR. FEIN: No, ma'am. But if we could have a
18 brief recess in place for a second copy of the classified
19 documents be retrieved out of the safe for PFC Manning to
20 review.

21 THE COURT: That's fine. Court is in recess

1 in place. If you want to stand up, move around, feel
2 free to do that.

3 (BRIEF RECESS.)

4 MR. FEIN: Your Honor, we're ready to begin.

5 THE COURT: Court is called to order.

6 Let the record reflect all parties present
7 when the court last recessed are again present in court.
8 PFC Manning and Major Hurley are over in the panel box.
9 And Major Fein, I'm sorry, what is coming in?

10 MR. FEIN: Your Honor, Mr. Prentice is
11 currently out of the courtroom bringing in one last
12 stipulation, but it's a stipulation of fact that the
13 court has already done a colloquy on and it's been
14 remarked as prosecution exhibit 153 Alpha and 153 Bravo.

15 THE COURT: And this was the stipulation of
16 fact regarding UBL?

17 Major Hurley, my records indicate that I've
18 already gone over this stipulation of fact with PFC
19 Manning, however at the time I went over it it was marked
20 as an appellate exhibit, not a prosecution exhibit. My
21 normal colloquy talks to PFC Manning about agreeing to

1 this stipulation of fact as a stipulation of fact for use
2 during the trial. Was that the defense's understanding
3 as well?

4 MR. HURLEY: Yes, ma'am, that's my
5 understanding what has occurred with respect to the
6 stipulation up to this point.

7 THE COURT: Even though it was admitted as an
8 appellate exhibit it was the understandings of all
9 parties that I was going over this stipulation of fact
10 with PFC Manning that this stipulation of fact at
11 appellate exhibit 153 would be used at trial as well?

12 MR. HURLEY: Yes, ma'am. It would be
13 considered by the trier of fact in making your
14 determinations.

15 THE COURT: Government agree with that?

16 MR. FEIN: Yes ma'am.

17 Prosecution exhibit 153 Alpha is the
18 unredacted, 153 Bravo for identification is the
19 classified. And the original appellate exhibit number is
20 appellate exhibit number 541.

21 THE COURT: Say that one more time.

1 MR. FEIN: Yes, ma'am. The copy the court
2 has in front of her is what has been marked as
3 prosecution exhibit 153 Alpha, the unclassified and
4 redacted version, and that's prosecution exhibit 153
5 Alpha for identification. Prosecution exhibit 153 Bravo
6 for identification is the classified version. Both of
7 those have been previously marked as appellate exhibit
8 541.

9 THE COURT: All right. Thank you.

10 Defense agree with that?

11 MR. HURLEY: Yes, ma'am. We only have the
12 classified version here with us in the panel box.

13 THE COURT: PFC Manning, have you had a
14 chance to take a look at that classified version of
15 what's now prosecution exhibit 153 Bravo?

16 THE ACCUSED: Yes, Your Honor.

17 THE COURT: Do you remember the colloquy that
18 you and I went through with respect to that stipulation
19 of fact?

20 THE ACCUSED: Yes, ma'am.

21 THE COURT: Do you understand when we went

1 through that colloquy that even though it was marked as
2 an appellate exhibit that it was the intent of the
3 parties and yourself that this would be used as a
4 stipulation of fact during the trial?

5 THE ACCUSED: That's correct, Your Honor.

6 THE COURT: Any reason from either of you
7 that I need to go over this with PFC Manning again?

8 MR. HURLEY: No, ma'am.

9 MR. FEIN: No, ma'am.

10 THE COURT: PFC Manning, do you understand
11 what this stipulation of fact is to be used for?

12 THE ACCUSED: What was that, ma'am?

13 THE COURT: Do you understand what this
14 stipulation of fact is to be used for?

15 THE ACCUSED: Yes, Your Honor.

16 THE COURT: Apparently we have four new --
17 one new stipulation of fact and three stipulations of
18 expected testimony, is my understanding --

19 MR. FEIN: Yes, Your Honor.

20 THE COURT: Would you describe those for the
21 record?

1 MR. FEIN: Yes, ma'am.

2 The first, Your Honor, has been marked as
3 prosecution exhibit 180 Alpha for identification which is
4 a stipulation of expected testimony for witness number
5 three from the court's order from the government's
6 Grunden filing.

7 Also, prosecution exhibit 181 Bravo for
8 identification and 181 Alpha for identification which is
9 a stipulation of expected testimony for witness number 29
10 from the government's Grunden filing.

11 Prosecution exhibit 182 for identification is
12 a stipulation of fact titled Adam Gadahn.

13 And prosecution exhibit 183 for
14 identification is stipulation of expected testimony for
15 Commander Youssef Aboul-Enein.

16 THE COURT: Now, the prosecution exhibits 180
17 and 182 Bravo, are there numbers associated with that
18 from the prosecution's witness list?

19 MR. FEIN: Ma'am, there are numbers
20 associated, but based off previous conversations with
21 court the standard number we're using is from the

1 government's Grunden filing, appellate exhibit 479, and
2 that's witness number three and 29.

3 THE COURT: Which one is three and which one
4 is 29?

5 MR. FEIN: Your Honor, prosecution exhibit
6 180 Alpha for identification is witness number three, and
7 prosecution exhibit 181 Alpha and Bravo for
8 identification is witness number 29.

9 THE COURT: And that's from the Grunden
10 filing at appellate exhibit what?

11 MR. FEIN: 479, Your Honor.

12 THE COURT: Thank you.

13 All right. PFC Manning, once again we're
14 going to do a colloquy regarding these three stipulations
15 of expected testimony and one stipulation of fact.

16 Now, do you have a copy of all of those in
17 front of you?

18 THE ACCUSED: Yes, Your Honor.

19 THE COURT: Now, there should be a copy of
20 prosecution exhibit 180 which should be a classified
21 stipulation of expected testimony for witness number

1 three from the Grunden filing, appellate exhibit 479, is
2 that right?

3 MR. FEIN: Your Honor, it is right. And
4 that's 180 Alpha is the classified version. I'm having
5 marked right now as prosecution exhibit 180 Bravo for
6 identification which is the unclassified redacted
7 version.

8 THE COURT: All right. PFC Manning, do you
9 have a copy of both 180 Alpha which is the classified
10 version, and 180 Bravo which is the unclassified version
11 of the stipulation of expected testimony for witness
12 number three?

13 THE ACCUSED: Yes, Your Honor.

14 THE COURT: And that would be the Grunden,
15 from the government's Grunden filing at appellate exhibit
16 479. So were you able to go through with your defense
17 team and figure out what witness that was?

18 THE ACCUSED: Yes, Your Honor.

19 THE COURT: And same for prosecution exhibit
20 181 Alpha which is the classified version and 181 Bravo
21 which is the unclassified version. Do you have those in

1 front of you?

2 THE ACCUSED: Yes, Your Honor.

3 THE COURT: And that would be for witness
4 number 29 from appellate exhibit 479?

5 THE ACCUSED: Yes, ma'am.

6 MR. HURLEY: Ma'am, if I may, internal for
7 the defense team we used the numbers from the most recent
8 government exhibit list. We have no doubt that these are
9 the same individuals.

10 THE COURT: All right. Do I need to be
11 referring to any different terms when I talk about this
12 with PFC Manning?

13 MR. HURLEY: No, ma'am.

14 THE COURT: So we're all on the same sheet of
15 music?

16 MR. HURLEY: Yes, ma'am. I just wanted to
17 apprise you that it's a different set of numbers, but we
18 are on the exact same sheet of music.

19 THE COURT: Just to insure that the record is
20 clear, after we've gone through this colloquy, at the
21 next recess if the defense would again for the classified

1 appellate exhibit just write appellate exhibit 180 and
2 181 just which witnesses you believe we're talking about
3 when we go through this colloquy just to insure that the
4 record is clear.

5 MR. HURLEY: Yes, ma'am.

6 THE COURT: And PFC Manning, looking at
7 prosecution exhibit 183, do you have the stipulation of
8 expected testimony from Commander Youssef Aboul-Enein?

9 THE ACCUSED: Yes, Your Honor.

10 THE COURT: And that's an unclassified
11 stipulation of expected testimony.

12 And also before you do you have a stipulation
13 of fact from Adam Gadahn?

14 THE ACCUSED: For Adam Gadahn, yes, ma'am.

15 THE COURT: Yes. Prosecution exhibit 182.

16 THE ACCUSED: Yes, ma'am.

17 THE COURT: And that's also an unclassified
18 stipulation of fact.

19 And did you sign all four of these
20 stipulations of expected testimony and the stipulation of
21 fact?

1 THE ACCUSED: Yes, Your Honor.

2 THE COURT: Now, before signing them did you
3 read them thoroughly?

4 THE ACCUSED: Yes, Your Honor.

5 THE COURT: Do you understand the contents of
6 each of these stipulations?

7 THE ACCUSED: Yes, ma'am.

8 THE COURT: Before signing them, did your
9 defense counsel explain the stipulations to you?

10 THE ACCUSED: Yes, ma'am.

11 THE COURT: Do you understand you have the
12 absolute right to refuse to stipulate to the contents of
13 these documents?

14 THE ACCUSED: Yes, ma'am.

15 THE COURT: Do you understand you should
16 enter into a stipulation only if you believe it's in your
17 best interest to do so? Do you understand that?

18 THE ACCUSED: Yes, ma'am.

19 THE COURT: Once again, there's a distinction
20 between the stipulation of expected testimony and
21 stipulation of fact. A stipulation of fact for Adam

1 Gadahn, what that means is when counsel for both sides
2 and you agree to a stipulation of fact, the parties are
3 bound by that stipulation and the stipulated matters are
4 facts and evidence to be considered along with all of the
5 other evidence in the case, do you understand that?

6 THE ACCUSED: Yes, Your Honor.

7 THE COURT: Now, for the three stipulations
8 of expected testimony, those are different. When counsel
9 for both sides and you agree to stipulations of expected
10 testimony, you are agreeing here that for prosecution
11 exhibit 180, if witness number three was here in court,
12 and for prosecution exhibit 181 Alpha and Bravo, if
13 witness number 29 was here in court, and for the
14 stipulation of expected testimony as prosecution exhibit
15 183 of Commander Youssef Aboul-Enein were here testifying
16 in court under oath, that they would each testify
17 substantially to what was in the stipulation.

18 When counsel for both sides and you agree to
19 stipulations of expected testimony you're agreeing that
20 if each of these witnesses were here testifying in court
21 they would say substantially what's in the stipulation of

1 expected testimony. The stipulation does not admit the
2 truth of the testimony. The stipulation could be
3 contradicted, attacked or explained in the same way as if
4 the person was testifying here in person.

5 Do you understand the difference between a
6 stipulation of fact and stipulation of expected
7 testimony?

8 THE ACCUSED: Yes, Your Honor.

9 THE COURT: Now, knowing what I've told you
10 and what your defense counsel told you earlier with
11 regard to these stipulations, do you still desire to
12 enter into each of them?

13 THE ACCUSED: Yes, Your Honor.

14 THE COURT: Do counsel concur in the contents
15 of the stipulations?

16 MR. FEIN: Yes, ma'am.

17 MR. HURLEY: Yes, ma'am.

18 THE COURT: Then prosecution exhibits 180
19 Alpha and Bravo are admitted. Prosecution exhibits 181
20 Alpha and Bravo are admitted. Prosecution exhibit 182
21 for identification is admitted. And prosecution exhibit

1 183 for identification is admitted.

2 Do we have copies of those original that I
3 can go ahead and mark?

4 Thank you.

5 The stipulations, both classified and
6 unclassified, have been admitted.

7 Is there anything else we need to address
8 before we have Major Hurley and PFC Manning return to the
9 defense table?

10 MR. FEIN: Yes, ma'am. The last thing is
11 just the admittance of prosecution exhibits 153 Alpha and
12 Bravo for identification which had already been, which
13 were the previous stipulations of fact for UBL, Your
14 Honor.

15 THE COURT: All right. What about it?

16 MR. FEIN: Is actually, since they've been
17 renumbered, Your Honor, just admitted under the
18 prosecution exhibit numbers.

19 THE COURT: Okay. Any objection?

20 MR. HURLEY: No, ma'am.

21 THE COURT: Prosecution exhibit 153 Bravo for

1 identification is admitted. Is there an Alpha?

2 MR. FEIN: Yes, ma'am, there should be.

3 THE COURT: Prosecution exhibits 153 Alpha
4 and Bravo are admitted.

5 Is there anything else we need to address
6 before we have PFC Manning and Major Hurley return to the
7 defense cable?

8 MR. FEIN: No, ma'am.

9 MR. HURLEY: Not from defense.

10 THE COURT: Let's turn now to the judicial
11 notice filings.

12 MR. COOMBS: Actually, ma'am, one quick
13 point. On PE 182, we covered this in the 802 session, it
14 had several exhibits that were identified for
15 identification. The defense's understanding is those
16 would have been admitted into evidence.

17 THE COURT: Is that the government's
18 understanding as well?

19 MR. FEIN: Yes, ma'am.

20 THE COURT: And that was, just for the
21 record, that's prosecution exhibit 182 for

1 identification? So we're -- or 181. That exhibit
2 references prosecution exhibit, it says prosecution
3 exhibit 15 for identification, prosecution exhibit 168
4 for identification, and prosecution exhibit 174 for
5 identification.

6 MR. FEIN: 174 Charlie, ma'am.

7 THE COURT: 174 Charlie.

8 Mr. Coombs, my understanding, you're telling
9 me and I do remember this from the 802 conference as
10 well, that the parties agree that all three of these
11 exhibits have been admitted already?

12 MR. COOMBS: That's correct, Your Honor.

13 THE COURT: Does either side any reason to go
14 through the stipulations and make the amendments or is
15 the record clear?

16 MR. FEIN: The record is clear, ma'am.

17 MR. COOMBS: Defense concurs.

18 THE COURT: All right. Thank you.

19 All right. Is there anything else that we
20 need to address before we proceed to judicial notice?

21 MR. FEIN: No, ma'am.

1 MR. COOMBS: No, Your Honor.

2 THE COURT: Have the judicial notice filings
3 by the government, there should be two of them, have they
4 been marked as appellate exhibits?

5 MR. FEIN: No, ma'am, they have not.

6 THE COURT: Is now a good time to do that?

7 MR. FEIN: Yes, ma'am.

8 Ma'am, it's probably going to take more than
9 five minutes to do that if you want to take a quick
10 recess.

11 THE COURT: All right. We'll make it ten
12 minutes. Court is in recess until 20 minutes after ten.

13 (BRIEF RECESS.)

14 THE COURT: Court is called to order. Major
15 Fein, are all the parties present when the court last
16 recessed again present in court?

17 MR. FEIN: Yes, ma'am, they are.

18 THE COURT: Thank you. Is there anything we
19 need to address before we proceed to judicial notice?

20 MR. FEIN: No, ma'am.

21 MR. COOMBS: No, ma'am.

1 MR. FEIN: Ma'am, the government filed over
2 the weekend two documents, first, what has been marked as
3 appellate exhibit 588 is a combined judicial notice
4 filing to the court, and then this is accounting for all
5 previous judicial notice including last week's court
6 ruling.

7 Then what has been marked as appellate
8 exhibit 587 is the government's relevance and non-hearsay
9 purpose for facts to be judicial noticed based off the
10 court's prior rulings.

11 THE COURT: All right. Let's begin with
12 appellate exhibit 587, relevance for judicial notice. I
13 note here that there are three proffered requests for
14 judicial notice. The court has addressed these before,
15 and based on defense objections basically postponed
16 ruling on those until trial. And the three add issues
17 are that Julian Assange was located in Iceland in
18 February of 2010 and working on the Icelandic modern
19 media initiative, see appellate exhibit 472, which I
20 assume are the chats?

21 MR. MORROW: No, Your Honor. Appellate

1 exhibit 472 was your ruling.

2 THE COURT: That was the initial ruling.

3 Okay.

4 The second one was that Lieutenant Colonel
5 Lee Packnett was quoted in a New York Times article dated
6 18 March 2010, in this instance judicial notice is
7 conditioned upon relevance and a non-hearsay or hearsay
8 exception usage.

9 And the third one was that a New Yorker
10 profile of Julian Assange titled, No Secrets, Julian
11 Assange's Mission for Total Transparency, exists and was
12 dated 7 June 2010. In this instance judicial notice is
13 conditioned upon relevancy and a non-hearsay or hearsay
14 exception usage.

15 Now, under those three titles the government
16 has put forth their view of relevance and hearsay.

17 Defense, what's your position?

18 MR. COOMBS: Your Honor, the defense
19 maintains its objections both for relevance and for
20 hearsay. We don't have any additional argument to offer,
21 so we would be satisfied with the court making a decision

1 based upon the government's proffer.

2 THE COURT: All right. And during the RCM
3 802 conference we held earlier the government has advised
4 that the government will provide the court with pinpoint
5 cites of the particular exhibits that have been admitted
6 or the testimony that has come before the court to
7 demonstrate relevance, and that's still left to be done,
8 is that correct?

9 MR. MORROW: That's correct, Your Honor. And
10 we'll provide that to the court and defense over the
11 lunch hour.

12 THE COURT: Does the government desire any
13 oral argument with respect to appellate exhibit 587?

14 MR. MORROW: No, Your Honor.

15 THE COURT: All right. So the court will
16 then decide later on today, probably, whether or not the
17 court will take judicial notice and whether to sustain or
18 overrule the defense's hearsay and relevance objections
19 once the court receives the pinpointed cites from the
20 government.

21 Now, anything else with respect to appellate

1 exhibit 587?

2 MR. COOMBS: No, Your Honor.

3 MR. MORROW: No, Your Honor.

4 THE COURT: Government, when might I expect
5 those pinpoint cites?

6 MR. MORROW: We'll do it at lunchtime.

7 THE COURT: All right. Thank you.

8 Let's now look at appellate exhibit 588.

9 This is a combined judicial notice list. We've had quite
10 a few judicial notice motions since the beginning of this
11 case and the court had asked the parties to get together
12 and put sort of a list of all of them that will be
13 potentially used in the merits and also on sentencing and
14 to separate those two. So the parties have done that.
15 There are some at issue highlighted in yellow that the
16 defense has proposed and the government apparently
17 doesn't agree with, and that would be number 15, public
18 law 111-258, portions of number B6, that Congress
19 believed overclassification was a potential issue and
20 passed this legislation which contained not only just
21 findings but specific statutory initiatives to address

1 that issue.

2 Number 2B8 that a letter to Secretary Robert
3 Gates from Carl Levin dated 28 July 2010 exists and
4 statements are admissible under MRE 801D2E and MRE
5 803.8A.

6 That defense, once again, I know this is in
7 the written list, but that second sentence there, are you
8 offering, in number nine, the court's already taken
9 judicial notice of the letter from Mr. Gates, that that
10 exists. Are you offering the letter from Senator Levin
11 as an admission by a party opponent or for context and
12 completion?

13 MR. COOMBS: Context and completion, Your
14 Honor.

15 THE COURT: All right.

16 And number then 12 of that series, William
17 Leonard, director of Information Security Oversight
18 Office of the National Archives, statements dated 22
19 March 2007 given at the 2007 House Committee on Homeland
20 Security hearings.

21 And finally, D5, the key assertions cited by

1 the defense that trained government classifiers made
2 only, quote-unquote, clearly right 64 percent of the time
3 is based on an official audit, in parens, quote, in an
4 audit of agency activity conducted by my office
5 approximately one year ago, we discovered that even
6 trained classifiers, with ready access to the latest
7 classification and declassification guides, and trained
8 in their use, got it clearly right only 64 percent of the
9 time in making determinations as to the appropriateness
10 of classification.

11 Now, the court's recollection of this is all
12 of this judicial notice was at issue when we were
13 litigating the overclassification, both the government's
14 motion to preclude evidence of overclassification and the
15 defense motion for judicial notice of a variety of
16 overclassification matters.

17 Now, the court issued some rulings, again,
18 conditioned on relevance. Defense, these highlighted
19 yellow passages that I just read, are they intended to be
20 used by the defense on merits, on sentencing, or both?

21 MR. COOMBS: On sentencing only, Your Honor.

1 THE COURT: These would appear not to be ripe
2 at this point?

3 MR. COOMBS: That is correct, Your Honor.

4 THE COURT: Does the government agree?

5 MR. MORROW: Yes, Your Honor.

6 THE COURT: Does the government have an
7 objection to number B8 there, the letter to Secretary
8 Gates from Senator Levin if the second sentence about
9 being statements admissible by a party opponent is
10 stricken?

11 MR. MORROW: Yes. Because Senator Levin
12 wouldn't be a party to this case based on your previous
13 rulings.

14 THE COURT: I understand that. What I'm
15 saying is that sentence goes away and it's only offered
16 as to put number nine in context for the response that
17 Secretary Gates gave to show what he was responding to.

18 MR. MORROW: I believe Secretary Gates'
19 response actually incorporates by letter, the letter, all
20 the relevant information that would come from the letter
21 from Senator Levin which is this is in response to your

1 letter of 28 July 2010.

2 THE COURT: So does the government have an
3 objection to taking judicial notice basically of the
4 whole package Secretary -- well, I already ruled on the
5 Secretary Gates letter -- that the Senator Levin initial
6 letter come in just to provide the context for the
7 response?

8 MR. MORROW: No, Your Honor.

9 THE COURT: Okay. So eight and nine with the
10 sentence the statements are admissible under MRE 801D2E
11 and MRE 803.8A, with that stricken, that's no longer an
12 issue, is that correct?

13 MR. MORROW: Yes.

14 THE COURT: Would the parties have any
15 objection with the court taking the original appellate
16 exhibit and striking through this second sentence?

17 MR. COOMBS: No, Your Honor.

18 THE COURT: Do I have the original or am I
19 working with my copy?

20 All right. So the court will then strike the
21 second sentence and put a line through it, the sentence

1 reading the statements are admissible under MRE 801D2E
2 and MRE 803.8A.

3 All right. So the remaining highlighted
4 portions then are what will remain at issue when we reach
5 the presentencing phase of the case, is that correct?

6 MR. COOMBS: Yes, Your Honor, that's correct.

7 THE COURT: Is there anything else we need to
8 address with respect to appellate exhibit 587?

9 MR. COOMBS: No, Your Honor.

10 MR. MORROW: No, Your Honor.

11 THE COURT: Is there anything else we need to
12 address with respect to any administrative or other issue
13 before we proceed with the government's case?

14 MR. COOMBS: No, Your Honor.

15 MR. FEIN: No, ma'am.

16 THE COURT: All right. Go ahead. Proceed.

17 MR. FEIN: Ma'am, if I may read some
18 stipulations from the chair here.

19 THE COURT: That's fine.

20 MR. FEIN: Ma'am, stipulation of expected
21 testimony dated 28 June 2013, this is prosecution exhibit

1 180 Bravo. This is for a witness number three from the
2 Grunden filing 80. Your Honor, several paragraphs are
3 redacted.

4 Your Honor, stipulation of expected testimony
5 for witness number 29 from the Grunden filing, appellate
6 exhibit 479 dated 28 June 2013, prosecution exhibit 181
7 Bravo.

8 (Prosecution exhibit 181B published in open
9 court.)

10 MR. FEIN: Your Honor, one correction, that
11 should be 13526.

12 THE COURT: All right. Defense, do you
13 agree?

14 MR. COOMBS: Yes, Your Honor.

15 (Prosecution exhibit 181B continued.)

16 Your Honor, the remaining paragraphs are
17 redacted; signed Captain Overgaard, Major Hurley and PFC
18 Manning.

19 THE COURT: All right.

20 Did the parties want to make that correction
21 to the typo over the recess and just go ahead and initial

1 it? That should be fine.

2 MR. FEIN: Yes, ma'am.

3 MR. COOMBS: Yes, ma'am.

4 MR. Von ELTEN: Your Honor, I have
5 prosecution exhibit 183, the stipulation of expected
6 testimony for Commander Youssef Aboul-Enein.

7 (Prosecution exhibit 183 published in open
8 court.)

9 MR. FEIN: Ma'am, a stipulation of fact,
10 prosecution exhibit 182, Adam Gadahn, dated 27 June 2013.

11 (Prosecution Exhibit 182 published in open
12 court.)

13 MR. FEIN: Your Honor, I'm sorry. I need to
14 make a correction on the record. Your Honor, I might
15 have missstated the date of paragraph one on page one,
16 Your Honor. I might have said on the record 11 September
17 2011. It should be as written, 11 September 2001.

18 THE COURT: All right. Defense agree?

19 MR. COOMBS: Yes, Your Honor.

20 MR. FEIN: Your Honor, the United States
21 offers to be read on the record stipulation of fact for

1 UBL information dated 10 May 2013 and has been admitted
2 as prosecution exhibit 153 Bravo, the unclassified
3 version of 153.

4 THE COURT: Go ahead.

5 MR. FEIN: The United States and the defense,
6 with the express consent of the accused, stipulate that
7 the following facts are true, susceptible of proof, and
8 admissible in evidence. These facts may be considered by
9 the finder of fact to establish the elements of all
10 charges and their specifications. They may be considered
11 by the sentencing authority and on appeal in determining
12 an appropriate sentence, even if the evidence of such
13 facts is deemed otherwise inadmissible. The accused
14 expressly waives any objections he may have to the
15 admission of this evidence at trial under the Military
16 Rules of Evidence, the Rules for Courts-Martial, the U.S.
17 Constitution, or applicable case law.

18 One. Usama bin Laden, hereinafter UBL,
19 was the leader of al-Qaeda, the terrorist
20 organization responsible for the attacks against the
21 United States at the World Trade Center and Pentagon

1 on 11 September 2001.

2 Two. On 2 May 2011, United States
3 government officials raided UBL's compound located in
4 Abbottabad, Pakistan and collected several items of
5 digital media. From the items of digital media, the
6 following items were obtained: One, a letter from
7 UBL to a member of al-Qaeda requesting the member
8 gather Department of Defense material posted to
9 WikiLeaks; two, a letter from the same member of
10 al-Qaeda to UBL, attached to which was the
11 Afghanistan War Log as
12 Posted by WikiLeaks; and, three, Department of State
13 information released by WikiLeaks.

14 The remainder of the information is
15 redacted, Your Honor.

16 THE COURT: All right.

17 MR. FEIN: Your Honor, at this time the
18 United States intends to call Mr. Lewis as its last
19 witness. However, the United States estimates that just
20 direct and attempt to qualify him will take approximately
21 an hour and a half to possibly two hours.

1 THE COURT: Is that the open session you're
2 talking about?

3 MR. FEIN: Yes, ma'am. And then the United
4 States would then request to move into a closed session
5 to finalize the foundational requirements to qualify him
6 as an expert. I also assume there will be an
7 unclassified cross examination prior to moving into that
8 session.

9 The reason I mention it, Your Honor, it might
10 be a good time to take an early lunch and come back early
11 so we can start and finish with Mr. Lewis.

12 THE COURT: So do Mr. Lewis in his entirety
13 after lunch?

14 MR. FEIN: Yes, ma'am.

15 THE COURT: All right. I believe there's
16 also the additional issues that have to be addressed
17 during lunch with respect to the Internet Archive
18 discussions that need to go on.

19 How long are you, and as I understand from
20 the RCM 802 conference we held earlier there's going to
21 be some documents that the government has just received

1 with respect to Mr. Lewis that the defense has not yet
2 seen, is that correct?

3 MR. HURLEY: Yes, ma'am, that's correct.

4 THE COURT: Do you need some time as well?

5 MR. HURLEY: Yes, ma'am.

6 THE COURT: Have you gotten the documents
7 yet?

8 MR. HURLEY: We haven't.

9 MR. FEIN: My understanding is they're ready
10 to go after this session, but they're classified so I
11 have to give them to the defense.

12 THE COURT: Well, at this point, knowing that
13 you haven't seen the documents yet and you may need
14 longer than you tell me, do the parties anticipate a
15 certain amount of time that will be necessary at this
16 point?

17 MR. FEIN: May we have a moment to confer
18 with the defense, Your Honor?

19 THE COURT: Yes.

20 (Discussion off the record.)

21 MR. FEIN: Ma'am, may we reconvene at 1300,

1 and then if more time is needed we'll figure it out at
2 that time?

3 THE COURT: Is that acceptable to the
4 defense?

5 MR. HURLEY: Yes, ma'am.

6 THE COURT: All right. Court is in recess
7 until 1300.

8 (LUNCH RECESS.)

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